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No 82-1185
In the
Supreme Court of the United States
October Term, 1982

Donald E. Muir, Jeff Buttram, and
O. Navarro Faircloth,

Petitioners

v.

Alabama Educational Television
Commission; et al,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Reply Brief

Edward Still
Counsel of Record
Susan W. Reeves
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham AL 35203
205/322-0631

Burt Neuborne
Charles S. Sims

Neil Bradley

Attorneys for Petitioners

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Table of Contents

I. "Political" considerations were paramount in cancelling "Death of a Princess."	1
II. Manageable judicial standards exist.	3

Table of Citations

CASES:

<u>CBS, Inc. v FCC</u> , 629 F2d 1 (DC Cir 1980), aff'd 453 US 367 (1981)	1
<u>New York Times Co. v United States</u> , 403 US 713 (1971)	3
<u>Collin v Smith</u> , 578 F2d 1197 (7th Cir), cert. denied 439 US 916 (1978)	3
<u>Mt. Healthy City Board of Education v Doyle</u> , 429 US 274 (1977)	3-4
<u>Village of Arlington Heights v Metropolitan Housing Development Corp</u> , 429 US 252 (1977)	4

OTHER:

New York <u>Times</u> , 13-16 May, 26 June 1980	2
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Reply Brief

L "Political" considerations were paramount in cancelling "Death of a Princess."

The respondents disengenuously attempt to argue either that the AETC's decision was "nonpolitical" because the Governor and Legislature were uninvolved or that all decisions of the AETC are "political" because it is part of the government. On this basis, the respondents suggest that petitioners have presented "hypothetical scenarios" and are asking for an "advisory opinion," Resp. Br. at 8. There are two reasons this argument must be rejected.

First, the respondents have misinterpreted what the petitioners mean by "political." The petitioners have used the term "political" as a shorthand description of decisions which are made "on the basis of the political, religious, or ideological content of the message," in the words of Judge Frank M. Johnson's dissent, Cert. Pet. 96a. A non-political decision is one which is "carefully neutral as to which speakers or viewpoints are to prevail in the marketplace of ideas," CBS, Inc. v FCC, 629 F2d 1, 30 (DC Cir 1980), *aff'd* 453 US 367 (1981).

Second, the real hypothetical question is the respondents' argument that AETC could "cancel a broadcast because of dangers to the State's citizens . . ." --for no

such danger was ever shown to exist.¹ Rather, the AETC based its decision to cancel "Death of a Princess" because some persons (including some whose business interests were heavily dependent on continued business relations with Saudi Arabia) called the station to say that they feared that Alabama citizens would be harmed if the film was shown. There is no evidence that any of these persons called from the Middle East, had talked to Alabamians in the Middle East, or had even seen the film. What they knew was that the film was "controversial" because the Saudi government had complained about it, and because a few corporations who had financial interests in Saudi Arabia had asked PBS and/or AETC to cancel the program.²

More fundamentally, the stated reason respondents advance for cancelling the program — that it would have

1. In the interim between 12 May 1980, the date of the airing of "Death of a Princess" in most parts of the United States, and 3 July 1980 when the district court decision was announced, the respondents submitted no evidence to the Court that any American had been harmed by the widespread telecasting of "Death of a Princess" in the United States and Great Britain. No such incidents were reported in the press. New York Times 13 May 1980, p. C7; 14 May, p. C27; 15 May, p. D5; 16 May, p. C19; 26 June, p. D1.

2. WNET, the New York City public television station received 1500 calls in the five days between Mobil Corporation's ad denouncing the film and the broadcast, 80% of them opposed to the prospective showing; on the day after the broadcast, the station received 600 calls, with about 70% in favor of the broadcast. New York Times, 14 May 1980, p. C27.

"exposed Alabama citizens in the Middle East to physical and emotional abuse" (Resp. Br. at 6) -- is analytically indistinguishable from the justifications governments always use when seeking to censor speech. See, e.g., New York Times Co. v United States, 403 US 713 (1971) (claim of harm to United States servicemen in Viet Nam); Collin v Smith, 578 F2d 1197 (7th Cir), cert. denied 439 US 916 (1978) (claim of harm to Jewish survivors of concentration camps). Despite being dressed in the language of "physical harm," the primary objection to the showing of the "Death of a Princess" is certainly "political," at least in the sense that First Amendment jurisprudence comprehends that term.

II. Manageable judicial standards exist.

The petitioners have suggested a test for determining which decisions meet the "political" standard -- that is, to determine when the First Amendment has been violated by a state-owned broadcaster -- by using the same standard this Court developed for cases involving the First Amendment and public employment. The respondents have nitpicked this standard for six pages, Resp. Br. at 9-14, yet nearly every one of their complaints could made against the Mt. Healthy standard.³

The respondents claim that the standard does not say "which of these competing interests predominates and

3. Mt. Healthy City Board of Education v Doyle, 429 US 274 (1977).

why," Resp. Br. at 12. The respondents have overlooked the discussion of "balancing competing interests" in *Pet.* at 24, in which the only overriding factors for the station would be a showing that the station was attempting to balance its overall presentation on an issue by excluding a program, or that the program was in a category not protected by the constitution.

Likewise, the respondents pretend ignorance of how one may compare "normal programming practice or policy" with the procedure used in a case under review. The respondents must be equally confused as to how they would defend a case by one of their employees like Mt. Healthy v Doyle or a racial discrimination suit like Village of Arlington Heights v Metropolitan Housing Development Corp., 429 US 252 (1977). In each of these cases, the Court has set a standard which required or allowed parties to present evidence of the usual practice, and allowed a court to draw an inference from a deviation from normal procedure.

The respondents efforts to pick apart the suggested standard are lengthy, but ultimately unpersuasive. Basically, what the respondents argue for is a rule that state-owned broadcasters have absolute immunity against lawsuits based on their content-based decisions. In short, the respondents want a proviso added to the First Amendment: "This article shall not apply to broadcasting facilities owned and operated by a state."

Submitted by,

**Edward Still
Susan Williams Reeves
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham, AL 35203-4168
205/322-6631
Attorneys for Petitioners**